SUPREME COURT, U. S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

Office-Supreme Court, U.S.
FILED
MAY 31 1968
JOHN F. DAVIS, CLERK

No. 1444

AMERICAN ACCEPTANCE CORPORATION,
a Delaware corporation,

Petitioner,

v.

EDWARD P. SCHOENTHALER and
AGNES A. SCHOENTHALER, husband and wife,
and WILLIS H. YEAMANS,

Respondents.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Florida was filed December 2, 1965 and is included in the pending record on Appeal. (R 1080-1091) The decision and opinion of the United States Circuit Court of Appeals for the Fifth Circuit is reported at *391 F2d 64.*

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

Petitioner has failed to clearly delineate the questions presented on its Petition for Writ of Certiorari. (P 3-16) Instead, under the heading "Questions Presented," Petitioner sets forth statutes, factual allegations and argument and it is difficult for Respondents to properly reply to the Petition when the questions presented to the Court have not been clearly framed in the Petition. In order that Respondents will be able to properly respond to the Petition, Respondents will frame the three questions which they believe are presented by the Petition for Writ of Certiorari.

I

Is there a direct conflict between the Decision of the United States Circuit Court of Appeals for the Fifth Circuit in the instant case and the prior decision of the United States Supreme Court in *HOGG v. RUFFNER, 1 Black 115-121, 66 U.S. Supreme Court Reports, 17 Law Ed 38 (1861)* and the decision of the United States Circuit Court of Appeals for the Seventh Circuit in the case of *In re Oakes, 267 F2d 516 (1959)*.

II

Whether Petitioner violated the provisions of Section 687.07 of the Florida Statutes, commonly known as the criminal usury statute.

III

Whether the trial court was correct in entering judgment in favor of Respondent, Willis H. Yeamans, on his counterclaim.

The above questions were raised in Pages 3-16 of the Petition entitled "Questions Presented."

STATEMENT

Under the "questions presented" heading of its Petition, Petitioner sets forth the alleged history of the financial transaction between the parties and of the case and, in addition, Petitioner recites numerous factual allegations but fails to refer the Court to the record on appeal to substantiate its statements.

Petitioner's recitation of the facts is not accurate and Respondents would respectfully refer the Court to the recitation of facts which was set forth in the Court of Appeals decision and which properly summarizes the case. (See 391 F2d 64 at P 66-72.) In the Petition for Writ of Certiorari numerous inaccuracies in the Statement of Facts will be found when compared to the record on appeal. For example, Petitioner states that the Respondent Schoenthalers' approached Maxwell for a bid on furnishings and fixtures and requested their aid and assistance for secondary financing in the amount of $170,000. (P 4, Petition) However, Petitioner's attorney for the transaction, Aaron M. Kanner, testified that he and Irving Greenfield, President of Maxwell Company, were in Chicago, Illinois, on another matter when they learned of Schoenthalers' motel project in Naples, Florida. (R-134) Kanner was told

that there was not going to be enough money for the project, that there was a need for secondary financing and if the secondary financing could be arranged then the party could also obtain the furniture contract. (R-135) Respondent Schoenthaler testified that he had not heard of the Maxwell Company when approached by a Mr. Allen Greenfield who indicated that the Maxwell Company might be able to help Respondents with their financing. (R 519) Likewise, George Carroll, Schoenthalers' attorney in the transaction, testified that Schoenthaler had been trying to get secondary financing to the extent of approximately $450,000 from other firms when the Maxwell Company approached them. (R 582, 588) John M. Lowe, Vice President of the Maxwell Company, testified that Respondents Schoenthalers' had needed secondary financing to pay off some obligations, to supply them with money to operate, and to finance the purchase of furniture and furnishings and they arranged this with a finance company and then sold them the furniture. (R 164, 165) From an examination of only two of the Petitioners own witnesses, Aaron Kanner and John Lowe, it is abundantly clear that Respondent Schoenthalers' were approached by the Maxwell Company for the purpose of arranging secondary financing for them.

Respondents respectfully suggest that an appropriate summary of the facts appears in the opinion of the Court of Appeals. Respondents, Schoenthalers', as owners, caused the Tahiatian Cove Motel to be constructed in Naples, Florida, and obtained primary financing from the Teamsters' Union Pension Fund. The Teamsters' Union Pension Fund thereupon received a first mortgage on the premises. The Schoenthalers' were overextended creditwise and they needed secondary financing to satisfy the

mortgage on the premises held by the Respondent, Willis H. Yeamans, to purchase furniture and furnishings and to provide them with cash for operating expenses. (391 F2d 67)

Originally, the Pension Fund had agreed to a mortgage of one million seven hundred fifty thousand ($1,750,000.00) Dollars, but subsequently the Union reduced its loan to one million three hundred fifty thousand ($1,350,000.00) Dollars, which necessitated the search for secondary financing in the amount of five hundred thousand ($500,000.00) Dollars. When these circumstances occurred, Mr. Allen Greenfield, representing the Maxwell Company, approached the Schoenthalers' for the purpose of arranging secondary financing, but thereafter, Irving Greenfield, President of Maxwell, told the Schoenthalers' they were only able to arrange $350,000.00 of the financing with the Petitioner. (391 F2d 71)

On April 28, 1964, Maxwell and the Schoenthalers' entered into a commitment letter agreement pursuant to which Maxwell agreed to sell the Schoenthalers' furniture, fixtures, carpet and other sundry equipment selected by Schoenthalers' for a cash price of one hundred eighty thousand ($180,000.00) Dollars, or a time price of two hundred thirty-eight thousand, four hundred eighty-four and 14/100ths ($238,484.14) Dollars, and to loan Schoenthalers' one hundred seventy thousand ($170,000) Dollars, at ten percent (10%) simple interest. The Schoenthalers' were to execute two promissory notes to evidence the indebtedness: one note in the amount of $238,484.14 payable without interest prior to maturity, and the other note in the amount of $170,000 bearing 10 percent simple interest per annum from date.

It was provided that both notes were to be paid with a single monthly payment of seven thousand six hundred twelve and 50/100ths ($7,612.50) Dollars, commencing August 1, 1964, and to be paid continuously for 59 successive months thereafter. The monthly payment was to be first applied to accrued interest on the $170,000 note and then toward the payment of the principal of the note for $238,484.14 and, when the latter note was fully paid, then to the payment of principal and interest on the $170,000 note. The commitment letter also required the Schoenthalers' to furnish a guarantee from the Respondent Willis H. Yeamans in the amount of one hundred thousand ($100,000.00) Dollars, guaranteeing their obligation to that extent. The $100,000.00 was to be placed in escrow to guarantee the obligation. On May 26, 1964, the Schoenthalers' executed and delivered to Maxwell the two promissory notes which are the subject matter of this suit. On the same date, Schoenthalers' executed a guaranty agreement by the terms of which they authorized and directed Maxwell to forward the $100,000.00 as a part of the loan of $170,000.00 directly to Petitioner as escrow holder. The Respondent Yeamans disputes that either he or anyone on his behalf had any authority to designate the Petitioner as escrow holder. It was without dispute that the $100,000.00 was never withdrawn by Petitioner from its account or paid to anyone nor was it in any way segregated, but instead, the money remained in Petitioner's general bank accounts. From Petitioner's books and records there was no way of identifying this sum, or even identifying the bank where the funds were deposited. Petitioner treated the money as its own and had shown the $100,000.00 simply as a liability on its books.

Between June 1 and July 10, 1964, furniture of the total value of $212,887.82 was delivered by Maxwell to the Schoenthalers', making a total disbursement to them on or before July 10, 1964 of $250,000.00. The Petitioner retained $100,000.00, purportedly as escrow agent for Yeamans, thereby providing the total sum of $350,000.00.

In the trial court, Petitioner sought to recover on the mortgage notes and the Schoenthalers' asserted the invalidity of the notes because of civil and criminal usury. The Respondent Yeamans filed his counterclaim alleging American Acceptance was holding $100,000.00 to secure Defendant's Yeamans guaranty of a portion of the mortgage indebtedness, and further alleged that there had been material breaches of the guaranty agreement, resulting in its termination and, in addition, American Acceptance was guilty of criminal usury, as defined in Section 687.07, Florida Statutes 1965, terminating Defendant's guaranty. *The parties stipulated* that the $100,000.00 held by American Acceptance was the property of Dr. Yeamans.

The trial court determined that Petitioner was guilty of criminal usury and forfeited the entire indebtedness, principal and interest, in accordance with Section 687.07 of the Florida Statutes and entered judgment for Dr. Yeamans for the $100,000.00 in accordance with the stipulation of the parties.

ARGUMENT

I

Is there a direct conflict between the decision of the United States Circuit Court of Appeals for the Fifth Circuit in the instant case and the prior

decision of the United States Supreme Court in *HOGG v. RUFFNER, 1 Black 115-121, 66 U.S. Supreme Court Reports, 17 Law Ed 38 (1861)*, and the prior decision of the United States Circuit Court of Appeals for the Seventh Circuit in the case of *In re Oakes, 267 F2d 516 (1959)*.

Under its Point One, Petitioner sets forth as the principal reason why the Court should grant its Petition for Writ of Certiorari, that there is a conflict in the decision of the Circuit Court of Appeals in the instant case and the prior decision of the United States Supreme Court in *HOGG v. RUFFNER* and the Seventh Circuit Court of Appeals in the case of *In re Oakes*, Supra.

In *HOGG v. RUFFNER*, the Supreme Court was concerned with a sale of land where the vendor had offered to sell the property for a stated cash price or at a higher price on credit terms. The vendor sold the land to the vendee on credit terms which were substantially higher than the cash price. The Supreme Court of the United States held that a person may make a bona fide sale of his property for a higher credit price and the difference in price would not be a violation of the usury laws, since a person could sell his property at different prices and this would not be a loan of money.

In the case of *In re Oakes*, Supra, there was a purchase of a pre-cut home which was to be placed on a lot at a cash price of $4,558.67 or on credit wherein there would be 59 installments of $71.06 each and a final installment of $2,254.00 which was an add-on of $1,938.00 to the cash price. The Court of Appeals found the transaction to be a bona fide sale of property and that there

was no violation of the Indiana usury laws. The law of Florida is no different from the law recited in those cases and this was recognized by the trial court and the Court of Appeals in this case. Thus, the trial court stated as follows:

> "There is no doubt but that the usury laws of Florida apply to a loan of money, or to the forbearance of a debt, and do not apply to the sale of property on credit. *Mid-State Homes, Inc. v. Staines, Fla. App. 1964, 161 So2d 569.* But was this simply a sale and purchase transaction? It is well settled in Florida that the law will look to the substance of the transaction rather than to the form to determine usury, bearing in mind that usury on the part of the lender is largely a matter of intent. *Kay v. Amendola, Fla. App. 1961, 129 So2d 170.*"

> "A careful evaluation of the evidence as a whole leads to the inescapable conclusion that the two notes represent but one loan transaction."

> "The actual cash price for the furniture sold to the Schoenthalers was $212,887.22, and it is impossible to determine what furniture was sold and included in the $238,484.14 note and that which was included in the $170,000 note. The cash price of $180,000 was established in the $228,484.14 note and the balance of the cost of additional furniture of $27,884.82 was charged against the $170,000 note with a balance of $37,112.58 paid to the Schoenthalers." (A 5-6, Petition)

In its opinion, the trial court reviewed various facts which indicated that the transaction was a loan transaction rather than a bona fide sale of personal property.

Likewise, the Circuit Court of Appeals stated that one of the questions presented on appeal was whether the transaction was a loan transaction or a bona fide sale of personal property on credit. The court then stated that the law of Florida requires an examination of the substance of a transaction rather than the mere form to determine usury. The Court of Appeals examined the evidence and found that this was a loan transaction subject to the usury laws of Florida. Consequently, the question presented in the trial court and in the Court of Appeals was whether the facts established that the transaction was a loan or a sale of property on credit, and both courts found that the evidence clearly established a loan transaction.

From the evidence it appears that the Union Pension Fund was to provide the Schoenthalers' with $1,750,000 of mortgage funds, which would provide them with the necessary funds to construct the motel project, satisfy the existing mortgage indebtedness on the property, equip and furnish the motel and provide the Schoenthalers' with the initial funds to operate the motel. (R 516, 517) However, the Union thereafter reduced its commitment to $1,350,000.00 which sum was not sufficient to provide Schoenthalers' with the necessary funds for the project and they began to look elsewhere for secondary financing. (R 516, 517)

The Schoenthalers' were looking for $500,000.00 of secondary financing which was to replace the sum of money eliminated from the Pension Fund mortgage funds. (R 519)

While Petitioner's attorney, Aaron Kanner, was in Chicago with the President of Maxwell, he learned of Schoenthalers' need for secondary financing and that whoever could provide this secondary financing could also obtain the contract for the purchase of furniture. (R 135)

George F. Carroll, Schoenthalers' attorney in the transaction, testified that the Schoenthalers' had sought the secondary financing from many other firms when Maxwell approached them. (R 582) He further testified that the amount of furniture and fixtures which were to be bought depended on the amount loaned to the Schoenthalers'. (R 588) From an examination of the testimony of Petitioner's own witnesses, Aaron Kanner, (R 157-188), John M. Lowe, (R 157-188), Irving Greenfield, (R 836), Rufus Frederick Alkins, (R 255-311) and John J. Grauer (R 312-356) it clearly appears that there was to be one loan transaction of $350,000.00, and these funds were to provide the Schoenthalers' with the necessary funds to satisfy the existing mortgage indebtedness, purchase the furniture and furnishings for the motel project and to provide them with the initial cash to commence the motel operation.

In its opinion, the Court of Appeals quoted from a portion of the testimony of the witnesses which clearly establishes that the Schoenthalers' were seeking secondary financing from the Petitioner and that the Petitioner supplied the necessary funds as a loan transaction. (391 F2d 71) The Florida courts have considered similar situations and determined them to be loan transactions. An example of a similar transaction is set forth in the case of *BROWN v. HOME CREDIT CO., 137 So2d 887 (2nd D.C.A. 1962), Affirmed, 148 So2d 257 (Fla. S. Ct. 1963).*

In that case one of the Defendants, Alderman, contracted with a decedent to construct an additional room to his home. Defendant, Home Credit Company, was to finance same. In addition, Defendant Alderman was to remove certain encumbrances from the property. In exchange for this, Alderman was to receive a note in the amount of $4,999.20 for the construction of the additional room and $3,750.00 for removing the encumbrances. The actual amount advanced by Home Credit Company for these items was $5,000.00, with the balance of $3,749.20 being reserved interest. Defendant Alderman assigned the notes to Home Credit Company and received payment. At *137 So2d 890*, the Florida Appellate Court stated as follows:

> "The lower court in its decree ruled that the burden of proving fraud had not been met by the defendant, but that the notes and mortgages held by Home Credit were drawn in an attempt to circumvent the usury statutes, for the reason that Home Credit in effect dictated and created the terms of the loan obligation to the original parties, with full knowledge that, if the loan had been handled as a normal loan, the amount of interest derived would, in fact, have been usurious . . . "

The court then held that the alleged time price differential was merely a disguise for usurious interest in two non-bearing interest notes and that Alderman and Home Credit, acting in concert, intended to disguise a usurious loan as a sale of a home improvement.

On further appeal, the Florida Supreme Court stated at *148 So2d 258:*

> "Our examination of the record and facts recited in the opinion of the District Court fully sustains its conclusions with respect to the petitioners position and participation in the transaction from the outset rather than as a third party holder in due course, *and we conclude also that the nature of the transaction between the parties was properly defined as a loan obligation subject to the usury statutes.*" (Emphasis supplied.)

The relationship between the parties in the Brown Case and the present one are very similar. In this case Petitioner was involved in the transaction from the beginning and established the terms of the transaction. Petitioner and the Maxwell Company acted in concert in effecting the usurious transaction and, in fact, it appears that they both shared in the interest earned by the notes.

In another case, *GORDON v. WEST FLORIDA ENTERPRISES OF PENSACOLA, INC., 177 So2d 859 (1st D.C.A. 1965)*, a note and mortgage was given by Plaintiff to cover the charges for the construction of a recreational hall to Plaintiff's residence. The face amount of the note was $3,919.80 while the principal amount of the note was $2,450.00. Defendant assigned the note and mortgage to Equitable Credit and Discount Company who subsequently reassigned it to the Defendant. The Florida Appellate Court cited the *BROWN v. HOME CREDIT COMPANY* case, supra and held that the Florida usury law was applicable to the note and mortgage. In *GRIFFIN v. KELLY, 92 So2d 515 (Fla. S. Ct. 1957)*, suit was brought

on the loan and the Defendant answered that that had been a joint venture and that there was usury. The trial court held that the defense of usury was inapplicable as a matter of law and entered judgment on the pleadings in favor of the plaintiff. The transaction involved the apparent sale of stock to the defendant and a time obligation to pay for same. The Florida Supreme Court reversed the trial court and stated at page 518:

> "We quote with approval the Restatement of Contracts, Section 529, which reads as follows:
> " 'Where the intent of a party to a bargain is to make a loan of money or an extension of the matury of a pecuniary debt for a greater profit than is allowed by law, the agreement is illegal although the transaction is put, in whole or in part, in the form of a sale, a contract to sell or other contract.' "

The court then quoted Professor Corbin's statement that whether a transaction is a lawful one or is a usurious one is to be determined by the intentions and purposes of the parties.

In this case, both the trial court and the Court of Appeals examined the evidence and found that this was a loan transaction and that petitioner had violated the usury statutes of the State of Florida. The cases cited by petitioner involve the application of the laws of other states and there is no issue of any conflict between those decisions and the decision of the Court of Appeals in this case. In this case, both the trial court and the Court of Appeals applied the law of Florida to the particular facts of this transaction, and Respondents respectfully submit that

both courts were eminently correct in determining that this was a loan transaction, and that the entire indebtedness was to be forfeited in accordance with Section 687.07 of the Florida Statutes.

II

Whether Petitioner violated the provisions of Section 687.07 of the Florida Statutes, commonly known as the criminal usury statute.

Petitioner contends that Section 687.07 does not apply to a contract for the loan of money at a usurious rate of interest unless the lender has actually collected the money from the borrower. Similarly, as in point one, this question involves a construction of the Florida Statutes and does not involve a question of Federal law or any constitutional question.

Petitioner contends that usurious interest must be paid before there can be a violation of the Florida usury law. This is simply not the law of Florida nor has it ever been the law of Florida. Statute 687.07 of the Florida Statutes states, in part, as follows:

> "Any person, or the agent, officer or other representative of any person, lending money in this state, who shall willfully and knowingly *charge* or *accept* any sum of money greater than the sum of money loaned, and an additional sum of money equal to twenty-five percent per annum upon the principal loaned . . . shall forfeit the entire sum, both the principal and interest, . . : " (Emphasis supplied.)

As the Court of Appeals stated in its opinion, the Florida courts have had numerous opportunities to construe this point in the usury statutes and they have resolved it against the Petitioner.

An illustrative case is *BROWN v. HOME CREDIT COMPANY, Supra*, where the amount advanced to the borrower was $5,000.00 while the amount of the promissory note was $8,750. The borrower made only one monthly payment out of 120 payments required to be made when the default occurred. The Florida Supreme Court held that the Defendants were guilty of criminal usury and ordered the forfeiture of the entire principal and interest in accordance with Section 687.07 of the Florida Statutes. Also, see *FIRST MORTGAGE CORPORATION OF VERO BEACH v. STELLMON, 170 So2d 302 (2nd D.C.A. 1964)(Cert. den., 174 So2d 32, Fla. 1965).* This question is solely one of the construction of the Florida Statutes and the Court of Appeals clearly applied the law of Florida in this case. Petitioner also refers to the case of *CONNER AIR LINES, INC., v. AVIATION CREDIT CORP., 280 F2d 895 (5th Cir. 1960)* and to the statement of the Court of Appeals, contained in a footnote to its opinion, that the Conner decision was contrary to the recent Florida cases and that *Erie* required the court to follow the Florida decisions. Petitioner does this for the purpose of suggesting that the Court of Appeals was in error in applying the Florida law. In the first place, the *Conner* case related solely to the application of Section 687.04 of the Florida Statutes, commonly known as the civil usury statute, as contrasted to the Section 687.07, commonly known as the criminal usury statute, which is involved in this case. When one charges interest which is in excess of 10 percent per annum but less than 25 percent per annum,

one is guilty of civil usury as provided by said statute. Section 687.04 provides that when usurious interest is taken or reserved or has been paid, the borrower is entitled to a forfeiture of double the amount so taken, reserved or paid. In the *Conner* case, Supra, the Fifth Circuit held that add-on interest in an agreement which was held to be a loan contract was not a taking, reserving or payment of usurious interest as defined in the civil usury statute. However, the Florida courts subsequently decided in the case of *FIRST MORTGAGE CORPORATION OF VERO BEACH v. STELLMON, Supra,* that add-on interest is interest taken or reserved and it is within the provisions of Section 687.04 of the Florida usury statutes, entitling the borrower to a forfeiture of double the amount of interest reserved, taken or paid. Consequently, in a footnote to its discussion of the application of either the civil usury penalty or the criminal usury penalty when interest exceeds 25 percent, the court noted the *Conner* case was opposed to the recent Florida cases and that the court would have to follow the Florida cases. (See 391 Fd2d 75)

In this case, however, the court was concerned with the application of Section 687.07, Florida Statutes, which states that there is to be a forfeiture of the entire principal and interest of the note when anyone willfully and knowingly charges or accepts a sum of money equal to 25 percent per annum interest which was determined to be true in this case.

In conclusion, Respondents respectfully submit that the second question raised by Petitioner only relates to the construction of the Statutes of Florida and both the trial court and the Court of Appeals properly applied the Florida law.

III

Whether the trial court was correct in entering judgment in favor of Respondent, Willis H. Yeamans, on his counterclaim.

In its stipulation with respondents Schoenthalers', Petitioner stipulated that it "acknowledges that it holds possession of $100,000.00 for Dr. Willis H. Yeamans in conformity with a guarantee escrow agreement . . . " (R 885) In the stipulation between Petitioner and Dr. Willis H. Yeamans on his counterclaim, the parties stipulated "that the sum of $100,000.00 being held by American Acceptance Corp. is the property of Dr. Yeamans." (R 1043)

Once the trial court determined that the entire principal and interest of the loan was to be forfeited pursuant to Florida Statute 687.07, it then entered judgment in favor of Respondent Willis H. Yeamans on his counterclaim in accordance with the stipulation of the parties. As the Court of Appeals stated:

> ' "it was obviously the conclusion of the District Court that the $100,000.00 was part of the principal amount of the loan, although the loan was never funded with that amount so as to make interest computations allowable thereon. The fact that the loan was never funded with the $100,000.00 does not mean that the amount would not be forfeited under Section 687.07. The $100,000.00 had to be either principal or interest. Whichever it was, it was forfeitable as the entire transaction was found to be criminally usurious." ' (391 F.2d 77)

Also see *MINDLIN v. DAVIS, 74 So2d 789, (Fla. S. Ct. 1954); WILLIAMSON v. CLARK, 120 So2d 637 (2nd D.C.A. 1960);* and *CORAL GABLES NATIONAL BANK v. CONSTRUCTORS OF FLORIDA, 119 So2d 741, (3rd D.C.A. 1960).*

CONCLUSION

The questions raised by Petitioner in its Petition for Writ of Certiorari relate solely to the construction of the Statutes of the State of Florida and the application of those statutes to the facts of this case. There is no important question of federal law or conflict in the decisions of the federal courts nor was any constitutional issue presented to the trial or appellate court for their decision. In this case both the trial court and the Court of Appeals examined the evidence and properly applied the Florida law as established by the prior decisions of the Florida courts to determine that Petitioner was guilty of criminal usury as set forth in the Florida Statutes. For these reasons Respondents respectfully submit that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was mailed on the _____ day of _____, 1968, to William Gresham Ward, 1240 duPont Building, Miami, Florida 33131, and to Richard Aaron Kanner, 1150 N. W. 14th Street, Miami, Florida 33136, Attorneys for Petitioner.

HARRY G. CARRATT